U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 13 2006

SRC 05 112 51957

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. While the director issued a request for additional evidence that inquired only into the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2), the director ultimately determined that the beneficiary was not an advanced degree professional. Specifically, the director determined that the beneficiary's foreign baccalaureate degree was not a foreign degree equivalent to a U.S. baccalaureate.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we find that the director erred in failing to consider the beneficiary's foreign Master's degree. Thus, we will remand the matter to the director for consideration of whether the petitioner has established its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9th Circuit that covers the jurisdiction for this matter.

> There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** ***See Castaneda-Gonzalez v. INS***, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority **to make the two determinations listed in section 212(a)(14). Id. at 423.** The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Thus, the director did not err in inquiring whether the beneficiary is qualified for the classification sought.

The beneficiary possesses a foreign three-year bachelor's degree from Sri Venkateswara University and a three-year Master of Computer Applications degree from Osmania University. The director focused on whether the beneficiary's three-year baccalaureate degree is the equivalent of a U.S. baccalaureate degree. The petitioner, however, is not attempting to combine a three-year degree with experience or other education that, in and of itself is not equivalent to a baccalaureate degree, to equal a U.S. baccalaureate degree. Rather, given the beneficiary's possession of a Master's degree, the issue is whether that degree is a foreign degree equivalent to a U.S. Master's degree.

The petitioner submitted an evaluation in which the evaluator, considering only the beneficiary's studies at Osmania University, concluded that the beneficiary "satisfied substantially similar requirements to the *attainment* of a Master of Science Degree in Computer Science from an accredited institution of higher education in the United States." (Emphasis added.)

While the director acknowledges the beneficiary's receipt of a Master's degree from Osmania University, her analysis considers only the beneficiary's baccalaureate degree from Sri Venkateswara University. The director provides no explanation for her failure to consider the beneficiary's Master's degree and we find that this failure was in error.

The beneficiary possesses a Master of Computer Science degree from Osmania University that is a foreign equivalent degree to a U.S. Master of Science Degree in Computer Science. As such, the beneficiary qualifies for classification as an advanced degree professional and meets the education requirements of the labor certification, a "Master's / For. Deg. Equiv." in computer science or engineering.

The record, however, contains evidence that the petitioner suffered a net loss in 2002, 2003 and 2004. The petitioner had minimal net current assets in 2003 and 2004. The petitioner's ability to pay the proffered wage, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), is the only issued raised by the director in her request for additional evidence. In response, the petitioner submitted evidence that it paid the beneficiary less than the proffered wage in 2004. The petitioner submits compiled (unaudited) financial statements for 2005, but does not indicate whether or not it paid the beneficiary's predecessor the proffered wage in 2003 and prior to hiring the beneficiary in 2004.

The director indicated that she would "not pursue" this issue in the final denial. Therefore, this matter will be remanded for consideration of whether the petitioner has established its ability to pay the proffered wage as of the petition's priority date, June 12, 2000. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.